

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>98-11046</u>
JANICE J. PLATT,)	
)	
Debtor)	
_____)	
)	FILED
JANICE J. PLATT and)	at 8 O'clock & 30 min. A.M.
BARNEE C. BAXTER, Trustee)	Date 9-22-00
)	
Plaintiffs)	
v.)	
)	
BANK UNITED,)	
)	
First Defendant)	
)	
GOVERNMENT NATIONAL MORTGAGE)	Adversary Proceeding
ASSOCIATION,)	Number <u>99-01077A</u>
)	
Second Defendant)	
)	
BARRETT, BURKE, WILSON, CASTLE,)	
DAFFIN & FRAPPIER, L.L.P.)	
)	
Third Defendant)	
_____)	

ORDER

Each of the three defendants in this adversary proceeding has moved for dismissal of the Second Recast Complaint of Janice J.

Platt, chapter 13 debtor, and Barnee C. Baxter, chapter 13 trustee (together "Plaintiffs", individually "Debtor" and "Trustee"). Defendants Bank United ("Bank United") and Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. ("Barrett") each move for dismissal. Government National Mortgage Association ("Ginnie Mae") moves for dismissal with prejudice, or in the alternative, summary judgment. (Bank United, Ginnie Mae, and Barrett are collectively referred to as "Defendants".) This adversary proceeding is dismissed.

Defendants' motions to dismiss are brought under Federal Rule of Civil Procedure (FRCP) 12(b)(6), which applies to bankruptcy cases under Federal Rule of Bankruptcy Procedure (FRBP) 7012(b). Ginnie Mae's alternative motion for summary judgment is brought under FRCP 56 which applies here under FRBP 7056. The standard for determination of a FRCP 12(b)(6) motion is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S.41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether a claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90

(1974). The court may consider facts alleged in the complaint as well as official public records such as debtor's bankruptcy case file. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3rd Cir. 1993) (citations omitted); Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993) (citations omitted). For purposes of a motion to dismiss, the factual allegations of the complaint are taken as true and are construed favorably to the pleader. Id., Solis-Ramirez v. U.S. Dept. of Justice, 758 F.2d 1426, 1429 (11th Cir. 1985). However, conclusions of law asserted in the complaint need not be accepted as true. The court makes its own determination of legal issues. Solis-Ramirez, 758 F.2d at 1429. The standard for Ginnie Mae's motion for summary judgment is not discussed because dismissal moots summary judgment.

The facts are as follows. Debtor filed a chapter 13 bankruptcy petition on April 21, 1998. She listed Bank United as a secured creditor with a mortgage on real property. On May 27, 1998, Bank United filed a proof of claim. Ginnie Mae was listed on the proof of claim.

Debtor filed an objection to the proof of claim on July 16, 1998, which objection stated in pertinent part.

3. Bank United has filed an arrearage claim May 27, 1998 in the amount of \$1,230.88.
4. The arrearage amount includes "uncollected late

charges" of \$41.15, "escrow advance/shortage" in the amount of \$500.96 and "bankruptcy attorney fees" in the amount of \$125.00.

5. The Debtor disputes owning each of these items and requests proof thereof. These amounts are not authorized by the loan documents, not authorized by the Bankruptcy Code and not approved by this Court.

Wherefore, the Debtor respectfully requests this Court to schedule a hearing and thereafter to reduce the arrearage claim by the amounts listed above.

The clerk issued a "NOTICE OF HEARING ON OBJECTION TO CLAIM" dated July 21, 1998 the notice provided

Debtor in the above-captioned case has filed an Objection to Claim(s) of United Bank, a copy of which is enclosed or shown on the reverse hereof.

If claimant wishes to oppose the objection, it should notify the Court in writing, and serve a copy on Joseph E. Mitchell, III, P. O. Box 1726, Augusta, GA 30903 no later than August 20, 1998, and urge an objection at a hearing which will be held for such purposes:

September 10, 1998, at 9:00 a.m.
United States Bankruptcy Court
Suite 150
827 Telfair Street
Augusta, Georgia 30901

Failure to respond will result in the entry of an order supporting the debtor's position, and the hearing removed from the calendar.

Bank United failed to respond to the notice. The clerk notified Debtor's attorney as follows on August 31, 1998.

[Bank United] defaulted under the notice issued by the court in [Debtor's Objection to Claim of Bank United]. Since no response was filed, we do not need to have a hearing, however, the proposed order submitted by you does not reflect the requested amount of claim. If you would like to submit a revised order reflecting the amended amount we can take the case off of the September 10th calendar.

In response, the following Order was submitted by Debtor's attorney.

Before the Court is the Debtor's Objection to the arrearage claim filed by Bank United. The Debtor objects to several items composing the arrearage claim. Specifically, the Debtor objects to payment of bankruptcy attorney fees. The hearing notice indicated that failure to respond would result in entry of an Order supporting the debtor's position. No response having been filed.

IT IS ORDERED that the arrearage claim be reduced by the sum of \$125.00, representing "bankruptcy attorney fees" for the creditor. The arrearage claim shall be allowed in the amount of \$1,105.88.

I executed the order on September 8, 1998. Debtor's chapter 13 plan was confirmed on November 12, 1998, and included Bank United's claim in the amount of \$1,105.88.

On July 26, 1999, Debtor filed the complaint initiating this adversary proceeding. A recast complaint was filed in September, in which Trustee was added as a plaintiff. The Second Recast Complaint was filed October 20, 1999.

Plaintiffs' Second Recast Complaint lists six counts

brought generally against Defendants. Count I alleges that the proof of claim filed by Barrett on behalf of Bank United and Ginnie Mae included unauthorized charges for "'bankruptcy attorneys fees' in the amount of \$125.00, 'uncollected late charges' in the amount of \$41.15 and 'escrow advance/shortage' in the amount of \$500.96", hereinafter "Fees" which are the identical charges complained of in the claim objection resolved in the underlying Chapter 13 case. The complaint seeks return of collected amounts and an injunction preventing collection of the Fees. Count II alleges that the proof of claim violated the automatic stay and seeks damages. Count III seeks certification of a class of debtors in whose bankruptcies Defendants filed claims that included Fees, and then seeks declaratory judgment, injunctive relief, turnover of amounts collected, and damages on behalf of that class. Count IV asks that Defendants be found in contempt of court for alleged violation of Local Bankruptcy Rule 3001-2, which requires that all claims be filed for the net principal balance only as of the date of the bankruptcy filing. Count V seeks certification of a class of debtors in the Southern District of Georgia and requests damages pursuant to Local Bankruptcy Rule 3001-2 on behalf of that class. Last, Count VI alleges that violation of the Local Bankruptcy Rule 3001-2 in turn violated FRBP 9011, and asks that sanctions be

imposed under that rule.

Defendants seek dismissal of all counts. Ginnie Mae moves in the alternative for summary judgment, and, in addition to raising defenses to the individual claims, seeks to be dismissed from the proceeding. The adversary proceeding is dismissed in its entirety based on the record of the underlying bankruptcy case.

In determining a motion to dismiss, the court may consider official public records such as a debtor's bankruptcy case file. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d at 1196; Watterson v. Page, 987 F.2d at 3. The above referenced objection to claim, clerk's correspondence to counsel and final order on the claim objection are the basis for dismissing this adversary proceeding.

In the underlying Chapter 13 case, Debtor objected to the same Fees as complained of here. Bank United defaulted on the objection. Debtor's attorney was requested to provide an order "reflecting the requested amount of claim." Debtor's attorney provided such an order which was executed by me. The order reduced Bank United's arrearage claim by the amount of the bankruptcy attorney fees, \$125.00, and stated an allowed amount for the claim that was indeed \$125.00 less than the amount Bank United had initially claimed. The order did not deduct the uncollected late

charges of \$41.15 or the escrow advance/shortage of \$500.96. Objections to those two charges were voluntarily abandoned by the Debtor.

Almost eleven months after the order was executed, Debtor filed this adversary proceeding. Each Count of the Second Recast Complaint rests on the allegation that proofs of claim should not include the same Fees addressed in the claim objection. Debtor now lacks standing to bring any Count in the Second Recast Complaint because she has already been granted relief to the extent requested as to the Fees. The Fees issue was addressed and resolved before confirmation. Debtor is bound by the confirmed plan and the order of confirmation. 11 U.S.C. §1327(a)¹.

This case was brought concurrently with two other adversary proceedings raising identical causes of action against other defendants. In those cases I held that the plaintiffs were entitled to pursue an objection to or reconsideration of a claim post-confirmation. Plaintiffs here are not entitled to either option. In both cases outlined below, the res judicata effect of 11

¹11 U.S.C. §1327(a) provides:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

U.S.C. 1327(a) did not bar the adversary proceeding because the plaintiffs qualified for the narrow exceptions to that statute provided by 11 U.S.C. §502(j)² or because the adversary proceeding and claim objection were both pending pre confirmation and the claim objection was continued at confirmation pending the outcome of the adversary proceeding.

In Layne v. Firststar Bank, N.A. et al. (In re Layne), adversary proceeding No. 99-01078A Bankr. S.D. Ga. (September __, 2000, Dalis, J.), the confirmed chapter 13 plan specifically retained the plaintiffs' right to file an objection to a claim. The objection was timely filed. The creditor amended its claim, deducting one of four contested charges. The plaintiffs withdrew the

²11 U.S.C. §502(j) provides:

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

objection "without prejudice," indicating that further legal action was contemplated. The adversary proceeding was filed less than three weeks later.

I held that the Layne plaintiffs could seek reconsideration of the claim under 11 U.S.C. § 502(j) and FRBP 3008³. Reconsideration of a claim requires a showing of "cause." 11 U.S.C. § 502(j). The plaintiffs had alleged facts sufficient to constitute "cause" for reconsideration and had acted to preserve that right. FRCP 12(b)(6) motion to dismiss based on the doctrine of res judicata was denied.

In Lawson v. NationsBanc Mortgage Corp. et al (In re Lawson) adversary proceeding No. 99-01079A Bankr. S.D. Ga. (September ____, 2000, Dalis J.), both an objection to claim and an adversary proceeding based on the same type of fees as objected to here were filed prior to confirmation. The objection to claim was scheduled to be heard at the chapter 13 plan confirmation hearing. At the hearing, a continuation of the objection was granted pending the outcome of the adversary proceeding.

³FRBP 3008 provides:

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

I held that the plaintiff in Lawson could go forward with the adversary proceeding. The objection to claim was continued at the confirmation hearing. Section §1327(a) could not bar the adversary proceeding where the objection to the claim had been clearly excluded, at the confirmation hearing, from the res judicata effect of the confirmed plan. Motion to dismiss on that ground was denied.

The facts of the case now before me present no qualifying exception to res judicata. The objection to claim was resolved in Plaintiff's favor well before confirmation of the chapter 13 plan. Eleven months after the claim was resolved exactly as Debtor specified, Debtor brought this complaint based on the identical previously objected to Fees. Following debtor's successful claim objection, nothing remains for reconsideration under §502(j) nor as a basis for this adversary proceeding.

It is, therefore, ORDERED that the motions to dismiss brought by Bank United, Government National Mortgage Association, and Barrett, Burke, Wilson, Castle, Daffin & Frappier, L.L.P. are granted.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 21st Day of September, 2000.